United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL 74-2026

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MILTON COHEN, et al.

Defendant-Appellants

REPLY BRIEF FOR DEFENDANT-APPELLANT COHEN

FREDERICK H. BLOCK
and S. EDWARD ORENSTEIN
Attorneys for Defendant-Appellant
295 Madison Avenue
New York, N.Y.
68[illegible]-1161

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PRELIMINARY STATEMENT

The government's supposedly factual statement of the case makes no effort to refute the delineation of the case set forth in Cohen's brief. Instead the government, as far as Cohen is concerned, has attempted to link him to the activities of Deutsch and Duboff by a grossly distorted view of the evidence. This false predicate is the non-existent foundation for the government's answer to Cohen's attack on the sufficiency of the evidence and is the supposed answer to Cohen's claim that a severance should have been granted and other serious Cohen claims of error.

Before proceeding to a detailed analysis of the government's totally misleading brief, a common ground should be pointed out. Under the evidence, Deutsch and Duboff used Richard Packing and its attractive Circus Wagon concept as a vehicle for their own enrichment. It is significant in this connection that they are charged as stock

manipulators in four other indictments involving other companies as indicated in the footnote at page 2 of the government's brief. Cohen, on the other hand, as the evidence described in his brief makes clear, was used as a patsy by Deutsch and Duboff. All of his actions were attributable to his faith in his company and its prospects rather than to any conspiratorial activity. By way of example, the undisputed fact that, after the Denver Funds had sold out, he plowed back into his company, to keep it viable, the profits he realized from the sales of his restricted shares plus substantial additional funds, is totally out of keeping with any notion that he was a party to a stock swindle.*

THE GOVERNMENT'S STATEMENT OF THE CASE

"The massive fraudulent scheme to manipulate the price of and to defraud investors in the common stock of Richard Packing" (Br. p. 3) may well have been engaged in by Deutsch and Duboff but Cohen was not involved. His participation is supposedly shown by (1) his profits on his sales of his own stock (2) his alleged role in the March 11, 1969 offering (3) his alleged giving out of exaggerated earning projections (4) his alleged issuance of bullish press releases and supposed suppression of bad news (5) his delay in issuance of the 1969 Annual Report and (6) his supposed connection with New Dimensions. As will be seen, none of these alleged activities were proved.

1. Cohen's Sales of his Shares

There is no connection between Cohen's sales of his insider shares and the activities of Deutsch and Duboff. He began selling his shares in October 1968 (GX48 at 1888)

* The government's other specific accusations against Cohen are shown below to have no basis in the Record.

without any knowledge that Deutsch and Duboff had a secret kickback arrangement with Shwidock and KAB. Despite the government's contention that Cohen sold through KAB and New Dimensions (Br. pp. 37-38), there is no evidence that Cohen knew that the buyers of his shares happened to be KAB at the beginning and New Dimensions at the end. The evidence is that Cohen entrusted the sales to completely different brokerage houses (GX 48 at 1888).

2. The Allegedly False Earnings Projections

Hugh Deane testified that he had received earnings projections in 1968 from Deutsch and that Cohen verified them (239, 241-242). Deane went on to say (what the government's brief omits) that he, Deane, checked them out thoroughly and found them correct (296-297). Obviously the reason why the projections were not realized is because of the 1969 change in accounting principles which prevented treatment as current income of the proceeds of the sale of franchises (1159-1160, 1167).

3. The March 11, 1969 Offering

Cohen's main brief (pp. 7-12) analyses the offering circular and the government claims of falsity. It also analyses the distribution of the shares in the offering and makes it plain that Cohen had no involvement. The government brief makes no attempt to counter this showing — it merely engages in rhetorical assertions that Cohen was involved in a fraudulent offering (Br. pp. 40 et seq).

The government's claim that Cohen's reliance on advice of counsel in connection with the offering circular was "fairly put to the jury in the charge and clearly rejected by them" (Br. p. 41) overlooks Cohen's contention, nowhere refuted in the government brief, that Cohen's conviction on Count 4 dealing with the offering circular was the result of the spillover from the erroneously admitted evidence under

the conspiracy count (Cohen Br. p. 35).*

In the final analysis, the March 11, 1969 offering was a drop in the bucket if Deutsch and Duboff were indeed engaged in a manipulation. Before the offering, there were 100,000 shares outstanding and the price of the shares was in the $28 range. There was no necessity for the secondary as far as any supposed manipulation was concerned. Indeed it increased the float which was not even desirable in a manipulation situation (728). In the worst view of the secondary, it resulted in the secret, as to Cohen, further enrichment of Deutsch and Duboff.

4. The Press Releases

The government makes a two pronged attack on the press releases (Br. pp. 47-48). It is claimed first that they were misleadingly "bullish" in that Richard Packing's supposed financial problems were not disclosed; and second that the number of franchises sold was misrepresented. Both of these attacks are specious.

The claim that Richard Packing was in financial difficulties during the period the releases were being issued — from May, 1969 (GX 31a at 1876) to April 6, 1970 (GX 31g at 1881) — is without basis in the Record. Kally testified for the government that financing problems only arose after the last press release (947-948):

> "Q. Do you know whether there were any other problems?
>
> A. In 1970, the inability to—
>
> MR. BLOCK: I am going to object to talking about any period in 1970, which is subsequent to the date that your Honor—

* Cohen's Brief, pp. 8-9 demolishes the notion still pressed by the government (Br. p. 4) that the stock options and common stock received by Deutsch and Duboff and their nominees, Harris and Morganstin, were related to the stock offering.

THE COURT: Yes. If you're going to talk about 1970 and talk about a period in 1970, would you tell us first what date you're talking about before you get into the subject matter?

THE WITNESS: The period of April and May of 1970.

THE COURT: I will permit an inquiry in that area, Mr. Block.

Q. Will you answer the question, what problems were there?

A. The financial problems with regard to real estate, construction. The other period of time, maybe the latter part of May, 1970, with—

Q. Would you tell the Court and jury, Mr. Kally, what were those problems?

A. Financial problems.

Q. Would you describe them in detail, please?

A. Slow pay on construction projects, slow pay of suppliers, delays in moving real estate contracts through the St. Paul office, a slow down of field service visits at the request of Mr. Cohen—

MR. BLOCK: I didn't get that.

THE WITNESS: A slow down of field service visits, operations visits to—

Q. Will you explain that, Mr. Kally?

A. That was at Mr. Cohen's request, that we not have people make field trips to the operating stores in Ohio or Miami at that particular period of time. I remember specifically a direction from Mr. Cohen that I don't go to Ohio, because of cost factors. I think everything basically revolved around finances at this time."

Brodeorb who also testified for the government could not say when the loss for the 1970 fiscal year occurred (1169-1170).

Faris who was a salesman talked only about the problem of finding locations (1298).

Further, there was no evidence that "many" franchisees were cancelling their contracts and having their money returned as the government contends (Br. p. 48). Brodcarb and Faris agreed that there had been only three cancellations (GX 13B-1 at 1793-1794, 1275). Kally's letter (Cohen Ex. EE at 2155), which described a meeting with the franchisees in May 1970 indicated that the very substantial franchise interests represented were satisfied with the program. The letter in question reads in pertinent part as follows (2157):

> "A question and answer period was held for the group as a whole and the meeting was concluded with a definite feeling of an improved attitude between the franchisees and the franchisor."

The claim that the press releases exaggerated the number of franchises sold is equally unsound.

There was no claim of falsity except as to the 210 figure in the 4/6/70 press release (GX 31g at 1881). Faris testified, contrary to the government's claim (Br. p. 31), that the 200 franchises which Cohen had described as sold in his March 17, 1970 letter to O'Meara (GX 4) was an understatement. He said he had told Cohen that in addition to the 180 franchises sold up to that time, a deal for 40 additional franchises in New York State was "sewed up" (1292). There was, therefore, ample basis for the use of the 210 figure a few days later in the press release in question.

As to the method of counting franchises sold which the government challenges in its brief (p. 48, footnote) Brodcorb for the government testified in support of Faris' practice of counting all the units mentioned in a contract (1165-1166).

> "Q. Now sir, did you count, or did you take into account of that particular contract, LL, on compiling 13-B-1?

A. Yes, I did.

Q. Did you count the units and, if so, how many units did you show were covered?

A. I did count the units. I only counted three for this particular agreement.

* * *

Q. Let me ask you this: Under the liberal interpretation that was in effect until the fall of 1969, could that agreement have been treated as an agreement for fifteen units?

A. It could have been, yes."*

The government's notion (Br. p. 48, footnote) that Louder had a different view is unsound. Louder was concerned only with the deferring of income (1361):

"A. I don't see where it has any accounting significance. The accounting significance was whether you should recognize the dollars or not. The number of units, whether it was 1 and 120 or 10 and 120, it didn't make any difference accounting wise."

The net of the foregoing is that there was a good faith basis for Cohen's listing of 210 franchises in the April 6, 1970 press release and that the government's claim that he misrepresented the number of franchises sold in that release is without merit.

5. The Alleged Delay on the Annual Report

In pressing its claim that Cohen as part of his role in the alleged conspiracy deliberately caused delay in the issuance of the 1969 Annual Report of Richard Packing Company to

*Cohen Ex. LL, which is not included in the Record or in the Appendix but which is available to the Court, was a contract for the sale of three franchises. It provided, however, for the subsequent execution of leasing agreements for twelve additional franchises. The accountant was required under the change in accounting principles to treat the contract as involving only three units, as he testified.

prevent the "true facts" about the company from coming to the attention of its stockholders (Br. p. 48), the government has ignored the Record. Louder, the partner in charge of the preparation of the annual report in question for Lybrand Ross Brothers & Montgomery, explained the technical accounting problems which prevented finalization of the report until some time after March 20, 1970. He then went on to testify that he was constantly being asked by Cohen and his associates when the report would be completed (1362-1363):

> "Q. Did you have conversations with Cohen with respect to when the audit would be complete?
>
> A. Yes. I don't recall anything specific, but there were questions from him and his associates as to when we would be finished.
>
> Q. Can you recall in substance the general nature of the conversation with Mr. Cohen about the date when the report would be completed?
>
> A. Just the normal client saying, 'When are you going to get done, get it out', and so forth".

Once the accountants were finished it was necessary for Bass & Co. to complete Cohen's letter to stockholders (1181-1182) and this was not done until April as appears from the date on Cohen's letter to stockholders which accompanied the annual report (1786).

Finally, Gloria Segal, who, at the time of trial, was no longer employed by Richard Packing (1265), testified that when the report came in in bulk from the printer in the Spring of 1970, all work in the office stopped and all the office help were engaged in the mailing of the report on the same day that it came in (1265-1267).

All of the foregoing is, of course, a far cry from any notion that Cohen had anything to do with delaying the issuance of the report.

The foregoing has a further significance:

Cohen had argued in his main brief (Pt. VII) that there was no evidence as to why the Denver Funds chose to unload their huge holdings as they did in July and August 1970 and in consequence that the evidence of those sales and attendant losses should have been excluded. The government, by conceding (Br. p. 49) that the Denver Funds *never* received the 1969 Annual Report, underscores the suggestion in Cohen's brief (p. 19) that the Funds could well have soured on the franchise industry because of the effect on earnings of the change in accounting principles which required the treatment of income from the sale of franchises as deferred rather than current. There was therefore no connection between the delayed report and the Funds' sales.

6. The New Dimensions Situation

The government's assertion that Cohen was an undisclosed principal in New Dimensions (Br. p. 5) is completely unsupported by the record.

The government purports to rely for this assertion on Hurley's testimony with respect to GX 37 (at 1883-1884). Briefly, Hurley testified that he attended a meeting with Deutsch and others in New York in January, 1970 after New Dimensions had been formed. Cohen was not present at the meeting. According to Hurley, Deutsch noted on a slip of paper (GX 37) proposed stockholding interests in New Dimensions and listed Cohen as a 12% interest (662-663, 665-667). Nothing was ever done to implement this as far as Cohen or any of the other interests shown on GX 37 were concerned, except for the interests of Deutsch and Duboff. This is conclusively demonstrated by the evidence that the siphoning off of the profits of New Dimensions was only for the benefit of Deutsch and Duboff. Surely if Cohen had had any interest whatsoever in New Dimensions, he would have been shown to have received some share of the profits. The Record fails to disclose anything whatsoever to that effect.

7. Other Distortions of the Record

(a) *F & T Meats and the Papworth Report*

The government makes much of its claim that the Papworth Report which Cohen approved, contained a false statement with respect to the acquisition of F & T Meats (Br. pp. 16-17). There are two circumstances which the government has seen fit not to mention. The first is that both Oscar Feldhamer for the government and his brother Dave for the defense, who actually handled the negotiations over a period of months, testified that there had been an agreement for the acquisition by Richard Packing of F & T Meats when Papworth was writing his report, but that the deal finally fell through when Oscar decided that he wanted cash instead of stock (799, 1316, 1319).

The second circumstance which the government has failed to mention is that it was Deutsch and not Cohen who forwarded the Papworth Report to Hurley of the Denver Funds (628).*

(b) *Status Marketing*

The government insinuates, in the total absence of any evidence, that the statement in Cohen's Ex. R to the effect that the Circus Wagon Concept had been selected by Status Marketing "from a group of competitive concepts" (2130) was untrue (Br. p. 7).

Its suggestion that Status was *promoted* by Cohen (Br. p. 39) is not borne out by the Record and has no relevancy in any event to the issues at trial. The government, on the other hand, ignores two crucial facts about Status — that the company engaged successfully in selling Circus Wagon franchises on a nationwide basis for some two years; and that its bankruptcy made no difference. Faris continued doing the same work for Richard Packing that he had been doing for Status. (Tr. pp. 4597-4598, 4679).

*In typically artful fashion the government (Br. p. 46) states that the Papworth Report "was forwarded to Hurley after being reviewed by Cohen and Deutsch."

POINT I

WITH RESPECT TO THE DENIAL OF A SEVERANCE (COHEN'S POINT III)

The government in a mere footnote to page 52 of its brief has attempted to answer Cohen's contention that the judgment requires reversal because of the prejudice he suffered from the admission of the machinations of Deutsch and Duboff with Shwidock and KAB and with New Dimensions — with all of which he had nothing to do.

The government contends that a severance was properly denied because only a single conspiracy was proved. This is fallacious on two grounds. As demonstrated in Cohen's main brief (Point II) and infra, p.12, the proof showed multiple conspiracies. In the second place, the test for granting a severance as laid down most recently in *United States v. Capra*, 501 F2d 267, 281 (2 Cir. 1974) is this: is the evidence against the defendant who requests severance little or vastly disproportionate in comparison to that admitted against the remainder of the defendants. There can be no question that in any fair view of the record — and not on the basis of the distorted view urged by the government — Cohen should have been granted a severance on the basis of the *Capra* test.

POINT II

WITH RESPECT TO COHEN'S POINTS I, II, AND IV.

The government has not met Cohen's contention in Point I that the trial court was mistaken in its view that the conspiracy charged a plot to defraud the Denver Funds rather than a plot to issue a false offering circular.

Its suggestion in support of its argument (Br. p. 69) that Cohen acquiesced in proof that went beyond the allegations of the information overlooks the undisputed fact that defense objections to that tack at the time of the government's opening had been overruled (107, 1745-1746).

With respect to Cohen's Point II contention that there was a fatal variance as to Cohen in the proof of multiple conspiracies, the government has relied on its distorted view of the record to support its argument that there was but a single conspiracy (Br. p. 51). Moreover the notion that the issue of multiple conspiracies was "fairly put to the jury" (Br. p. 52), ignores the contention in Cohen's main brief, p. 27, that the jury would have had to acquit Deutsch and Duboff, the core conspirators, if it had found more than one conspiracy. Cf. *Kelly*, at p. 757 (349 F2d).

In attempting to answer Cohen's Point IV—the insufficiency of the evidence point, the government has relied as shown in Cohen's main brief, and as demonstrated herein on distortions of the Record. The proof wholly failed to connect Cohen with any wrongdoing.

POINT III

WITH RESPECT TO COHEN'S POINTS V, VI AND VII.

Cohen's Point V urged that the chart showing Cohen's sales of his insider stock should have been excluded.

Point VI urged that Richard Packing's account with New Dimensions should have been excluded.

Point VII urged that evidence of the Funds' losses should have been excluded.

In light of the showing herein and in Cohen's main brief, each of the rulings complained of constituted reversible error.

POINT IV

WITH RESPECT TO COHEN'S POINT VIII (THE SURNOW SITUATION)

Cohen's Point VIII involved the court's refusal to allow him to adduce his efforts to secure Surnow's attendance at trial.

Contrary to the government's assertion (Br. pp. 87-88), *Malizia* is precisely in point in principle. This Court said the following (503 F 2d at p. 581):

> "An adverse inference is likely to arise if a party fails to call a key witness who is expected to give favorable testimony to his cause. 'It would present an anomaly in the law if, while one party may comment upon the absence of an opposing party's witness . . . the opposing party were not permitted to introduce evidence to excuse the absence of such witness.' (Schumacher v. United States, 216 F 2d 780, 788, 8th Cir., 1954, cert. denied 348 U.S. 951, 1955)."

Reversal should accordingly be had because of the grave prejudice resulting from the court's erroneous ruling excluding Orenstein's testimony from the jury's consideration.

POINT V

WITH RESPECT TO COHEN'S POINT IX (THE GOVERNMENT SUMMATION)

The government's attempt to justify the prosecutor's summation because it did not involve the name calling that was involved in *White* (Br. pp. 88-90) does not meet the issue. The prosecutor's conduct in successfully achieving

Cohen's conviction on non-existent evidence and on distortions of the facts represents a subtler version of what was condemned in *White* and is to be likewise condemned. Reversal should be had to correct this abuse of the prosecutorial function. Cf. Mr. Justice Shapiro dissenting in *Nigrone v. Murtagh and Nadjari*, —A.D.2d—(2d Dept.) N.Y.L.J. 12/17/74—front page.

POINT VI

WITH RESPECT TO COHEN'S POINT X (THE CHARGE AND RULINGS ON REQUESTS)

The government's defense of the charge and its rulings on requests (Br. pp. 78-81) rehashes its distortion of the evidence, previously discussed herein, and provides no answer to Cohen's serious contentions. The errors in the charge and in the court's refusals to charge as requested constitute reversible error as urged in Cohen's main brief on this point.

SUMMARY

The major misstatements in the government brief have been noted herein. It should be apparent from what has been shown on Cohen's behalf that he was convicted on the basis of his mere association with the supposedly reputable financial advisor of his company and the latter's partner.

CONCLUSION

For the reasons assigned above, assigned in Cohen's main brief and in the briefs of the co-appellants, reversal should be had herein.

Respectfully submitted

FREDERICK H. BLOCK
and S. EDWARD ORENSTEIN

Frederick H. Block and
S. Edward Orenstein,
Of Counsel

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 3 day of Jan , 1975 deponent served the within Brief upon Atty Gen

attonrye(s) for appellee

in this action, at 2nd Circuit Courthouse
Foley Sq
NYC

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
3 day of Jan , 1975.

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976